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No. 99-898

IN THE
Supreme Court of the United States

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

DONNA E. SHALALA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

Respondents make no effort to justify the extraordinary harshness of the Welfare Reform Act. They do not contend that when Congress enacted the provisions of the Welfare Reform Act at issue here, it had before it evidence suggesting that the availability of welfare benefits undermines the self-sufficiency of noncitizens in particular, or that noncitizens were more likely than citizens to abuse the welfare system. Moreover, they acknowledge that noncitizens should be considered a discrete and insular minority entitled to special protection against discriminatory state and local legislation (Resp. Br. 10), and articulate no reason why Congress is less likely to engage in discriminatory overreaching against this vulnerable minority than are state or local legislatures. Rather,

respondents' submission is based exclusively on precedent, indeed on a single precedent: this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976).

Respondents' heavy reliance on *Diaz* is understandable —it is the only decision in this Court's history holding that legislation affecting no one's immigration status or ability to naturalize is nevertheless a permissible exercise of congressional authority over immigration. More important, at the time *Diaz* was decided, this Court had not yet determined the extent to which equal protection principles applied to federal legislation. That uncertainty ended with this Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). After *Adarand*, the only relevant question is whether this case involves an area in which "special deference to the political branches of the Federal Government [is] appropriate." See *id.* at 217-18. Deference may well be appropriate when, as in *Diaz*, Congress determines that a durational residence requirement is necessary to protect the actuarial soundness of an insurance program, but no deference is warranted when Congress indulges in unfounded generalization about the propensity of noncitizens to abuse the welfare system. Plenary review is warranted to determine whether *Diaz* truly bears all of the weight that respondents, as well as Congress and the lower courts, have placed upon it.

1. Respondents believe that the provisions of the Welfare Reform Act at issue here should be sustained as long as they can be "properly viewed as a regulation of aliens' conduct in the United States." Resp. Br. 13. Of course, we acknowledge that Congress has broad authority over immigration and naturalization, see, *e.g.*, *Diaz*, 426 U.S. at 79-80, but the existence of legislative authority provides no warrant for excusing Congress from complying with the Bill of Rights. *Adarand* illustrates just this point.

Indeed, numerous cases have already held, in particular, that federal legislation that discriminates on the basis of citizenship must comply with the Bill of Rights. See, *e.g.*, *Landon v. Plascencia*, 459 U.S. 21, 32-35 (1982) (procedural due process applies to deportation proceedings); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931) (Takings Clause protects foreign nationals); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (Congress may not subject aliens to summary punishment).

It is true that the broadest language in *Diaz* suggests that Congress is immune from the equal protection principles that govern state and local legislation when it exercises its power over immigration. See 426 U.S. at 84-86. But at the time *Diaz* was decided, it was quite unclear whether equal protection principles applied to nationwide legislation with the same force that they apply to state legislation. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). After *Adarand*, Congress is entitled to special deference only when challenged legislation involves a question on which this Court finds "special deference to the political branches of the Federal Government to be appropriate." 515 U.S. at 217-18.

No doubt, many congressional judgments about noncitizens will qualify for special deference because they fall within Congress's unique competence to make policy about how to secure the nation's borders, conduct its foreign policy, or offer naturalization. But here, the only judgment Congress has articulated is that welfare should not be available to noncitizens because it undermines their incentives to work and their self-sufficiency. See 8 U.S.C. § 601 (Supp. II 1996).[1] We know from *Graham*

[1] Respondents also contend that the provisions of the Welfare Reform Act at issue here provide an incentive to naturalize. See

v. Richardson, 403 U.S. 365 (1971), that this Court will not defer to states' legislative judgments about noncitizens' welfare eligibility, see *id.* at 371-76, and there is no basis here to believe that Congress is any less likely to overreach at the expense of a discrete and insular minority when making judgments about the effects of welfare on recipients' incentives to work and self-sufficiency than are state and local governments. Indeed, the Welfare Reform Act reflects, at best, an overbroad and unfair generalization about noncitizens' supposed abuse of the welfare system. See Pet. 19-23. The court of appeals, however, never asked whether the legislative judgment at issue here was one on which deference to Congress was appropriate, feeling bound instead by the broadest language in *Diaz*. See Pet. App. 9a-11a. In light of *Adarand*, then, surely it is time to revisit this language in *Diaz*, and determine whether it can be squared with doctrinal developments since that case was decided.

2. In any event, respondents' view that the provisions of the Welfare Reform Act at issue here fall within the scope of congressional authority to regulate immigration is deeply suspect. Respondents suggest that enacting discriminatory legislation targeting noncitizens that would be unconstitutional if enacted by a state or local government and that affects no one's immigration status "is a routine and normally legitimate part of [Congress's] business." Resp. Br. 11 (quoting *Diaz*, 426 U.S. at 85). But aside from *Diaz*, no decision of this Court

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Resp. Br. 13. But as we explain in our petition, even putting aside Congress's failure to articulate this objective, the Welfare Reform Act is not a rational means to this end, since it disqualifies immigrants from welfare even when they are not yet eligible to naturalize. See Pet. 21 n.14. And in any event, as we explain above, Congress may not impose disabilities on noncitizens in contravention of the Bill of Rights merely because it wishes to provide an incentive to naturalize.

has ever upheld, by reference to congressional immigration powers, legislation that affects no one's immigration status. Nor do respondents even identify any similar legislation. As for *Diaz*, the insurance program at issue in that case presented a real problem, but one that was not peculiar to Congress's special competence over matters of immigration. As we explain in our petition, *Diaz* actually presented no question falling within Congress's unique competence over immigration matters, but rather the "special public interest" in ensuring the actuarial soundness of an insurance program through a durational residence requirement. See Pet. 14-15.

Particularly revealing is respondents' effort to bolster their position by reference to congressional regulatory power over aliens. Relying on *Graham*, respondents observe that "the Court has stressed that '[t]he national government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, *regulation of their conduct before naturalization*, and the terms and conditions of their naturalization.' " Resp. Br. 12-13 (quoting *Graham*, 402 U.S. at 377) (emphasis supplied by respondents). Respondents fail to explain, however, how the Welfare Reform Act regulates anyone's conduct. Being poor is not "conduct," and in any event the Act does not regulate impoverished immigrants. It does not render deportable or otherwise penalize noncitizens who become destitute, nor does it prohibit anyone from seeking welfare benefits from state or local governments, or from private charities. Congress's willingness to permit destitute noncitizens to remain in this country—even to be on welfare —as long as the economic and social burdens that they impose fall on state and local governments or private charities, is surely a peculiar "regulation" of the conduct

of noncitizens.[2] Indeed, we know from *DeCanas v. Bica*, 424 U.S. 351 (1976), that welfare eligibility laws do not amount to regulation of the conduct of aliens. As the Court explained in that case, such a view would have required the Court in *Graham* to have held that the state statutes at issue were preempted by the exclusive federal authority to regulate immigration and naturalization, rather than holding as it did that the state statutes violated equal protection. See *DeCanas*, 424 U.S. at 355.

3. In an effort to minimize the tension between their readings of *Diaz* and *Graham*, respondents claim that "the Court in *Graham* clearly limited its holding to *state* legislation." Resp. Br. 10 (emphasis in original). That view seriously mischaracterizes *Graham*.

The petitioners in *Graham* argued that the discriminatory state welfare legislation at issue had been authorized by Congress in the Social Security Act. See 403 U.S. at 380. The Court concluded, however, that even if the Social Security Act could be construed to authorize the state legislation at issue, that construction would not save it: "Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization Congress does not have the power to authorize the individual states to violate the Equal Pro-

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[2] It is particularly ironic that respondents rely on *Graham*, since in that case the Court held that Congress may not authorize the states to discriminate on the basis of citizenship. See 403 U.S. at 381-82. This is vivid evidence that not every federally imposed limitation on welfare eligibility is a permissible "regulation" of the conduct of noncitizens. We explore the tension between respondents' submission and *Graham* at greater length below.

tection Clause." *Id.* at 382.[3] But if respondents were correct that limitations on the eligibility of noncitizens for public benefits can be "properly viewed as a regulation of aliens' conduct" or "encouraging naturalization and discouraging immigration for the purpose of obtaining public benefits," Resp. Br. 13 (citation and footnote omitted), then *Graham* was incorrectly decided. After all, in *Graham* the Social Security Act's limitations on eligibility for federally funded welfare benefits could also have been viewed as regulating noncitizens' conduct, encouraging naturalization, and discouraging immigration for improper purposes. Nevertheless, the Court held that those purposes were insufficient to authorize discrimination against noncitizens.

In fact, *Graham* should control the Food Stamps, TANF, and Medicaid claims we make in this case. As we have explained, in *Graham* the Court held that Congress could not authorize the states to discriminate on the basis of citizenship when they administer federally funded welfare benefits. In the Welfare Reform Act, however, Congress authorized the states to reject applications from lawful permanent resident noncitizens who arrived in the country after August 22, 1996, when administering Food Stamps, TANF, and Medicaid. While SSI—the other program at issue here—is federally administered, we cannot see why Congress should have greater ability to discriminate on the basis of citizenship when it provides for the federal administration of a welfare program than when it provides for identical benefits to be distributed through state or local governments. Thus, the tension between

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[3] This proposition was reaffirmed only last Term, when this Court held that the provisions of the Welfare Reform Act purporting to authorize states to set welfare benefit levels that discriminate against new residents could not save that discrimination from equal protection attack. See *Saenz v. Roe*, 526 U.S. 489, 507 (1999).

Graham and the reading of *Diaz* that has been adopted by the lower courts, as well as Congress itself, warrants plenary review.

4. Perhaps most remarkably, respondents do not even attempt to justify the astonishing discrimination worked by the provisions of the Welfare Reform Act at issue here. Respondents make no effort to explain why the availability of welfare benefits undermines noncitizens' incentives to support themselves more than it affects citizens' incentives. Nor do they claim that noncitizens are more likely to abuse welfare benefits. As we explained in the petition, in fact the evidence is to the contrary. See Pet. 18-23. The only pertinent difference between citizens and noncitizens is the relative political powerlessness of the latter. That, of course, cannot be a permissible justification for discriminatory legislation. And respondents do not doubt the enormous human toll exacted by this discriminatory legislation, which we discuss in the petition and which the four amicus briefs supporting the petition explore in considerable detail.

What is more, the Welfare Reform Act's discrimination based on alienage is especially offensive because it undermines sound principles of cooperative federalism, about which respondents say not a word. Under the Welfare Reform Act, the Federal Government, while solely responsible for the presence in this country of lawful permanent resident noncitizens who become destitute, is able to impose on state and local governments the entire social and economic burdens associated with those individuals—it refuses to help support those individuals but will not authorize their deportation either. Surely a cooperative federalism would renounce that approach. When Congress alone has authorized the admission of noncitizens into this country, its discrimination against them in providing federally funded welfare benefits is an offense to federalism as well as equal protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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